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Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case

Paul G. Kauper
University of Michigan Law School

PENUMBRAS, PERIPHERIES, EMANATIONS, THINGS FUNDAMENTAL AND THINGS FORGOTTEN: THE *GRISWOLD* CASE

*Paul G. Kauper**

Griswold v. Connecticut[1] held by a seven-to-two margin that the Connecticut criminal statute forbidding the use of contraceptive devices by married couples was unconstitutional under the fourteenth amendment. This simplified version of the holding, however, does not adequately portray the great variety of doctrines relied upon by the Justices constituting the majority. The opinion of the Court, written by Mr. Justice Douglas, found the statute invalid because it invaded a constitutionally protected right of marital privacy found to emanate from the specific provisions of the Bill of Rights and made applicable to the states by the fourteenth amendment. The separate opinion by Mr. Justice Goldberg, joined by Mr. Chief Justice Warren and Mr. Justice Brennan, expressed concurrence in Mr. Justice Douglas' opinion and then proceeded to an independent ground—that the right of privacy as invoked and protected in this case is a fundamental right protected by the due process clause against state deprivation. The opinion used the ninth amendment to help bolster the independent fundamental rights theory. The separate concurring opinion by Mr. Justice Harlan, incorporating views expressed earlier in a dissenting opinion,[2] clearly disassociated itself from the opinion of the Court and rested squarely on the proposition that the Connecticut statute intruded into the privacy of married couples, thereby impairing a fundamental right protected by the due process clause of the fourteenth amendment. Mr. Justice White, writing a separate concurring opinion, likewise explicitly rested his case on the due process clause, finding that the Connecticut statute as applied to married couples deprived them of liberty without due process of law, since it invaded the right to be free from regulation of the intimacies of the marriage relationship. The dissenting opinions by Justices Black and Stewart rejected the notion that the "right of privacy" on which the case turned finds support in the specifics of the Bill of Rights, and further rejected the idea that the Court is free, in the interpretation of the due process clause of the fourteenth amendment, to formulate a conception of fundamental rights having no foundation in the specific guarantees of the Constitution.

* Henry M. Butzel Professor of Law, University of Michigan.—Ed.

1. 381 U.S. 479 (1965).

2. Poe v. Ullman, 367 U.S. 597 (1961).

This brief introductory statement is sufficient to point up the fascinating feature of *Griswold*: it laid bare the basic differences within the Court respecting its role in the protection of fundamental rights and respecting the interrelationship of the fourteenth amendment and the Bill of Rights as a central aspect of this problem. It is to these aspects of the case that my comments are directed.[3]

The varying theories followed in the several opinions in the *Griswold* case can be fully understood and appreciated only in the context of the tortuous but fascinating history of the judicial interpretation of the fourteenth amendment.

I. Fundamental Rights and Their Relationship to the Bill of Rights

By the end of the nineteenth century the Supreme Court had committed itself to an interpretation of the due process clause whereby the clause was enlarged beyond its original connotation of procedural regularity and converted into a vehicle for protecting the so-called fundamental rights.[4] In the twentieth century the Court has used various expressions to describe its understanding of fundamental rights: they are the rights implicit in those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions";[5] they are those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[6] In his classic opinion for the Court in *Palko v. Connecticut*,[7] Mr. Justice Cardozo spoke of the rights "implicit in the concept of ordered liberty."[8] The rights protected as fundamental include both procedural and substantive rights. As applied in its earlier stages, the due process clause as the guarantee of procedural rights centered on the "fair trial" concept.[9] The substantive rights emphasized in the earlier stages of the development of the clause were liberty of contract and freedom in the enjoyment and use of property. These eventually suffered a decline in the degree of

3. The editors requested me to give my interpretation and comments respecting the *Griswold* decision. No attempt is made here to deal at length with the issues and questions to which the comments are directed or to call the reader's attention to the voluminous literature on these matters. The documentation is on the whole limited to the necessary case citations.

4. See, *e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897).

5. Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

6. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

7. 302 U.S. 319 (1937).

8. *Id.* at 325. For a collection of phrases used by the Court in formulating the fundamental rights theory, see Mr. Justice Black's dissenting opinion in *Griswold*, 381 U.S. at 511-12 n.4.

9. See, *e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937); Hurtado v. California, 110 U.S. 516 (1884).

judicial protection received, but in their place the Court later stressed the freedoms specifically set forth in the first amendment—the freedoms of religion, speech, press and assembly.[10]

A notable and controversial aspect of this development was the Court's recognition that the fundamental rights protected under the due process clause of the fourteenth amendment had no necessary relationship to the specifics set forth in the first eight amendments as restrictions on the federal government. In other words, the Court rejected the idea that the effect of the fourteenth amendment was to make the first eight amendments apply to the states. In his opinion in *Palko*, Mr. Justice Cardozo said that the due process clause absorbed the specifics of the Bill of Rights only insofar as they were "of the very essence of a scheme of ordered liberty."[11] Indeed, the whole process whereby the freedoms of the first amendment were incorporated into the fourteenth amendment as fundamental rights was a clear-cut application of substantive due process concepts. The end result has been that the Court has, on the one hand, rejected certain specifics catalogued in the first eight amendments as non-fundamental and has, on the other hand, recognized as fundamental certain liberties not specified in these amendments.

To state these developments in what may be called the "main line" in the interpretation of the fourteenth amendment is not to suggest that they have gone unchallenged. The elder Mr. Justice Harlan dissented from the proposition that the rights protected under the first eight amendments were not included in the rights protected under the due process clause.[12] Mr. Justice Holmes spearheaded a group of dissenters who remonstrated against the use of the due process clause to invalidate state legislation found to be an interference with liberty of contract.[13] Mr. Justice Black, joined by Mr. Justice Douglas, forcibly stated in his dissenting opinion in *Adamson v. California*[14] his objections to the fundamental rights interpretation, which he equated with natural law thinking. In his view the effect of the fourteenth amendment was to make the Bill of Rights apply to the states, but the Court could not use the due process clause as a vehicle for protecting any other rights on the theory that they were fundamental. Justices Murphy and Rutledge, in their dissents in *Adamson*, had agreed that the specifics of the Bill of Rights ap-

10. For references to the cases and a review of this development, see KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 18-54 (1956).

11. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

12. See Twining v. New Jersey, 211 U.S. 78 (1908) (dissenting opinion); Hurtado v. California, 110 U.S. 516 (1884) (dissenting opinion).

13. Lochner v. New York, 198 U.S. 45 (1905) (dissenting opinion).

14. 332 U.S. 46 (1947).

plied to the states but did not agree that those specifics were the only rights protected under the fourteenth amendment.

The course of the decisions in recent years has tended to obscure the application of the fundamental rights theory. The judicial protection of economic and proprietary liberties—the liberties emphasized in the early substantive rights interpretation of the due process clause—has declined. The Court has said that these liberties are subject to restriction in the reasonable exercise of the states' power to regulate economic matters, and has made it clear that in this area judicial review of the reasonableness of legislation operates at a minimal level.[15] Indeed, Justices Black and Douglas, in writing for the Court in some of the cases, have stated that the Court is not free to inquire at all into the reasonableness of restrictions on economic liberty, since that is an intrusion into the legislative domain in areas where the Constitution imposes no specific restriction.[16] On the other hand, the Court has come to recognize that all of the first amendment freedoms are fundamental and therefore protected against the states under the due process clause of the fourteenth amendment.[17] Likewise, the Court has found in more recent decisions that some of the procedural safeguards embodied in the specifics of the Bill of Rights are fundamental and must therefore be respected by the states. The right to counsel,[18] the freedom from unreasonable search and seizure,[19] the privilege against self-incrimina-

15. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

16. See Mr. Justice Douglas' opinion for the Court in Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, 313 U.S. 236 (1941), and Mr. Justice Black's opinions for the Court in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), and Ferguson v. Skrupa, 372 U.S. 726 (1963). Mr. Justice Harlan concurred in a separate opinion in *Skrupa*, on the ground that the statute there involved bore "a rational relation to a constitutionally permissible objective." *Id.* at 733.

In his opinion in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., *supra*, Mr. Justice Black said that, beginning with the *Nebbia* case, the Court had steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases, and in so doing had consciously returned closer and closer "to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." 335 U.S. at 536.

17. Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of press); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

The freedom from expropriation of property without compensation, guaranteed by the fifth amendment, is also recognized as a fundamental right protected under the fourteenth amendment. See Griggs v. Allegheny County, 369 U.S. 84 (1962); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897). Likewise the prohibition of cruel and unusual punishment, found in the eighth amendment, has been made effective against the states under the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

18. Gideon v. Wainwright, 372 U.S. 335 (1963).

19. Mapp v. Ohio, 367 U.S. 643 (1961).

tion,[20] and the right of confrontation[21] have been extended to the states by virtue of the due process clause. Moreover, the Court has now made it clear that when a right specifically embodied in the Bill of Rights is recognized as fundamental, it has the same full scope and meaning as a restriction on state action as it does in its primary context within the Bill of Rights as a restriction on the federal government.[22] It is in this sense that the first amendment and the provisions of the Bill of Rights specifying the procedural guarantees mentioned above are said to be incorporated into the fourteenth amendment.

Notwithstanding the emphasis in recent years on the protection under the fourteenth amendment of certain specifics of the Bill of Rights, the Court has continued to afford protection in the name of due process against governmental restrictions found to constitute unwarranted or unreasonable interference with rights or liberties not included in the specifics of the first eight amendments. Thus, it has invalidated under the due process clause of the fourteenth amendment a state statute subjecting public employees to arbitrary dismissal[23] and a state regulation arbitrarily restricting admission to the bar.[24] The Court relied on the due process clause of the fifth amendment to invalidate racial segregation in the schools of the District of Columbia.[25] Similarly, in holding invalid the federal restriction on the issuance of passports to Communists, the Court found that the statute was an unduly broad restriction on the right to travel, which was declared to be a fundamental liberty protected under the due process clause of the fifth amendment.[26] In addition, the Court has never overruled cases of earlier vintage such as *Meyer*

20. Malloy v. Hogan, 378 U.S. 1 (1964).

21. Pointer v. Texas, 380 U.S. 400 (1965).

22. See Mr. Justice Brennan's opinion for the Court in Malloy v. Hogan, 378 U.S. 1 (1964), and Mr. Justice Goldberg's separate opinion in Pointer v. Texas, *supra* note 21. Mr. Justice Harlan has dissented from this view, taking the position that state criminal procedures are invalid under the due process clause only if they are fundamentally unfair. See his dissenting opinion in Malloy v. Hogan, *supra*, and the concurring opinions by Justices Harlan and Stewart in the *Pointer* case, *supra*. Mr. Justice Harlan likewise makes a distinction between the fundamental freedoms of expression protected against state action under the due process clause and the freedoms stated in the first amendment as a restriction on Congress. See his separate opinion in Roth v. United States, 354 U.S. 476 (1957). To the same effect, see Mr. Justice Jackson's dissenting opinion in Beauharnais v. Illinois, 343 U.S. 250 (1952).

23. Wieman v. Updegraff, 344 U.S. 183 (1952).

24. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

25. "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

26. Aptheker v. Secretary of State, 378 U.S. 500 (1964). See also Kent v. Dulles, 357 U.S. 116 (1958).

v. Nebraska,[27] invalidating a Nebraska statute forbidding the use of foreign languages in teaching public school classes, and *Pierce v. Society of Sisters*,[28] invalidating an Oregon statute requiring parents to send their children to public schools. The Nebraska statute was found to be an arbitrary interference with "the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own";[29] the Oregon statute was found to be an arbitrary interference with the liberty of parents to direct the upbringing and education of their children. These cases were clearly grounded on the fundamental rights interpretation of the due process clause, and there has been no suggestion in later cases that they have been repudiated.[30]

The decisions in the main line of interpretation of the fourteenth amendment support the following conclusions: (1) The Court has not accepted the thesis that the effect of the fourteenth amendment is to make all of the first eight amendments applicable to the states. (2) The Court has adhered to the idea that the due process clause protects only those rights that are fundamental, and that specifics of the Bill of Rights are absorbed into the fourteenth amendment only because they are regarded as fundamental. (3) The Court has continued to recognize that the fundamental rights protected under the due process clauses of both the fifth and fourteenth amendments may include rights not included in the specifics of the Bill of Rights.

II. Analysis of the *Griswold* Opinions

A. *Introduction: The Poe v. Ullman Dissents*

The opinions in *Griswold* must be examined against the background of this historical development to see what contribution they have made in this troubled area of constitutional interpretation.

27. 262 U.S. 390 (1923).

28. 268 U.S. 510 (1925).

29. Meyer v. Nebraska, 262 U.S. 390, 394 (1923).

30. For other earlier cases, see Jacobson v. Massachusetts, 197 U.S. 11 (1905), upholding a compulsory vaccination law, and Buck v. Bell, 274 U.S. 200 (1927), upholding a statute authorizing compulsory sterilization of mental defectives in state institutions. Both cases rested on the assumption that the due process clause afforded protection against arbitrary or unreasonable invasion of bodily integrity. See also Skinner v. Oklahoma, 316 U.S. 535 (1942), holding invalid under the equal protection clause a statute requiring sterilization of certain classes of habitual criminals. Mr. Justice Douglas, who wrote the majority opinion, said that the statute involved one of "the basic civil rights of man." *Id.* at 541.

For other cases resting on the use of the due process clause to protect against unreasonable restriction on personal liberties, see Griswold v. Connecticut, 381 U.S. at 504 n.* (separate opinion of White, J.)

First, however, attention should be called to the dissenting opinions of Justices Douglas and Harlan in the earlier case of *Poe v. Ullman*,[31] in which the Court refused to pass on the constitutionality of the Connecticut birth control law on the ground that such a decision would be premature, since there was no showing that the statute was actually being enforced. In their separate opinions these two Justices, after concluding that the elements of a justiciable case or controversy were present, found the Connecticut ban on the use of contraceptives unconstitutional because of its invasion of the right of privacy of married couples.

In his *Poe* dissent, Mr. Justice Douglas said that although he believed that "due process" as used in the fourteenth amendment included all the protections of the first eight amendments, he did not think it was confined to them.[32] He cited several cases to support his view that the liberty protected by the due process clause includes liberties in addition to those stated in the first eight amendments.[33] Indeed, he suggested that the due process clause could be used as a basis for inquiry concerning the constitutionality of social legislation dealing with business and economic matters, and that while the legislative judgment on these matters is nearly conclusive, it is not beyond judicial inquiry.[34] Apparently Mr. Justice Douglas was ready to use the "liberty" phrase of the due process clause as a source of judicially protected rights and interests, apart from the specifics of the Bill of Rights. He said that "liberty" was a conception that sometimes gained content from either the emanations of the specific guarantees "or from experience with the requirements of a free society."[35] He characterized the right of privacy as emanating "from the totality of the constitutional scheme under which we live."[36] This language obviously bears a close relationship to such language as "fundamental principles of liberty and justice," "ordered liberty," and the other phrases used in the past to define the fundamental rights protected under the due process clause.

Mr. Justice Harlan, dissenting in *Poe*, found the Connecticut statute invalid because it was an unwarranted invasion by the state of the privacy of the marital relationship, which he asserted was protected as a fundamental liberty secured by the fourteenth amendment. His opinion is notable for its review and reasoned defense of

31. 367 U.S. 497 (1961).
32. *Id.* at 516.
33. *E.g.*, Kent v. Dulles, 357 U.S. 116 (1958) (right to travel); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to marry, establish a home, and bring up children).
34. Poe v. Ullman, 367 U.S. 497, 518 (1961) (dissenting opinion).
35. *Id.* at 517.
36. *Id.* at 521.

the fundamental rights theory. This dissenting opinion impresses me as not only the ablest and most persuasive opinion that has been written on this subject, but also, because of its careful analysis of the right of marital privacy, the best opinion that has been written on the constitutionality of the Connecticut statute. Mr. Justice Harlan made it clear that he did not rest his decision on the ground that the statute's general policy against the use of contraceptives was an irrational exercise of the police power; his objection was to the method by which the state attempted to enforce this policy insofar as it reached into the privacy of the marital home. Because he regarded this as a particularly sensitive area, he felt that the Court was under a special duty to protect this relationship against arbitrary invasion.

B. *The Opinion of the Court: Mr. Justice Douglas*

We turn now to the *Griswold* opinions. Mr. Justice Douglas' unusually short opinion of the Court combined a curious, puzzling mixture of reasoning with extraordinary freedom in the interpretation of earlier cases. His whole opinion was directed to the end of demonstrating that the right of marital privacy is protected under the Bill of Rights and then carried over as a restriction on the states via the fourteenth amendment. At the outset he seemingly rejected the possibility of invalidating the Connecticut statute on the ground that its policy against the use of contraceptives constituted an unreasonable exercise of the police power and hence a deprivation of liberty without due process of law.[37] Rather, it was the direct operation of the law on the intimate relation of husband and wife, and on their physician's role in one aspect of that relation, which raised the crucial issue. He stated that the Constitution has protected certain rights which are derived from the Bill of Rights, although not expressly named there. He spoke of rights "peripheral" to the specifics named in the first eight amendments and argued that without these peripheral rights the specific rights would be less secure. Thus, he said, the Court has interpreted the first amendment as including such peripheral rights as the right of association.[38] On the basis of this peripheral rights reasoning—and at this point the reader experiences a sense of confusion—he interpreted the *Meyer* and *Pierce* cases to mean that the first amendment forbids a state to "contract the spectrum of available knowledge";[39] he then concluded that part

37. "Overtones of some arguments suggest that *Lochner* v. *New York* . . . should be our guide. But we decline that invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482.

38. See Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

39. 381 U.S. at 481-82.

of the opinion by saying, "and so we reaffirm the principle of the *Pierce* and *Meyer* cases."[40]

But then Mr. Justice Douglas went on to restate the peripheral rights theory. He interpreted the cases previously cited in support of the notion of peripheral rights to mean that the specific guarantees have penumbras, formed by emanations from those guarantees, that help give them life and substance. At that point he went to the heart of his argument, saying that "zones of privacy" are created by various guarantees: the first amendment, which in its penumbra includes the privacy linked with the freedom of association; the third amendment, which prohibits the quartering of soldiers in any house in time of peace without the consent of the owner; the fourth amendment, which protects against unreasonable search and seizure; and the fifth amendment, which protects against self-incrimination. He also threw in for good measure the ninth amendment, although its relevancy to his argument in showing a zone of privacy is not apparent. He quoted the language of *Boyd v. United States*[41] that the fourth and fifth amendments protect against all governmental invasions of "the sanctity of a man's home and the privacies of life,"[42] and the statement in *Mapp v. Ohio*[43] that the fourth amendment creates "a right to privacy, no less important than any other right carefully and particularly reserved to the people."[44] He said that the Court has had many controversies over the penumbral rights of "privacy and repose," and construed those cases[45] to bear witness that the right of privacy pressing for recognition in *Griswold* was a legitimate one.

Griswold, he continued, "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship."[46] Such a law could not stand, because " 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "[47]

40. *Id.* at 483.
41. 116 U.S. 616 (1886).
42. *Id.* at 630.
43. 367 U.S. 643 (1961).
44. *Id.* at 656.
45. *E.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Frank v. Maryland, 359 U.S. 360 (1959); Breard v. Alexandria, 341 U.S. 622 (1951).
46. 381 U.S. at 485.
47. *Id.* at 485 (quoting from NAACP v. Alabama, 377 U.S. 288, 307 (1958)).

The opinion concluded with the following paragraph:

> We deal with a right of privacy older than the Bill of Rights —older than our political parties, older than our school system. Marriage . . . is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[48]

Taken as a whole, Mr. Justice Douglas' opinion is ambiguous and uncertain in its use of the specifics of the Bill of Rights to invalidate the Connecticut statute. Is the right of privacy included within the penumbra of the marriage association and is this association in turn identifiable, as suggested by the last paragraph of the opinion, with a general right of association peripheral to the first amendment freedoms? Or is the intimacy of the marriage relationship included within a general zone of privacy of home and family derived both from the specifically protected zones of privacy and the penumbra of privacy emanating from specific rights? Or is it the theory of the case that the Connecticut statute violated the fundamental rights associated with family and the home, not because the statute rested on a policy which unreasonably interfered with these rights but because it employed means which violated a right of privacy derived from the specifics of the Bill of Rights? Whatever the interpretation, it is clear that Mr. Justice Douglas worked hard in his opinion to demonstrate that the decision does not rest independently on an interpretation of the due process clause, but is based on implications from those of the first eight amendments which are made applicable to the states by means of the fourteenth amendment.

C. *Concurring Opinions*

1. *Mr. Justice Goldberg*

Mr. Justice Goldberg, joined by Mr. Chief Justice Warren and Mr. Justice Brennan, wrote a separate opinion. Although he said at the outset that he concurred both in the judgment and the opinion of the Court, Mr. Justice Goldberg devoted the major part of his opinion to the elaboration of a separate theory having no necessary relation to the notion that the right of privacy at issue is an emanation from specifics of the Bill of Rights or embraced within the penumbra of these rights. While Mr. Justice Goldberg does not accept the view that due process as used in the fourteenth amendment includes all of the first eight amendments, he does agree that

48. *Id.* at 486.

the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. The major portion of his opinion was devoted to an elaboration of the fundamental rights theory. He repeated with apparent approval the Court's statement in *Snyder v. Massachusetts*[49] that the due process clause protects rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[50] To support the proposition that the liberty protected under the due process clause includes the right to marry, establish a home, and bring up children, he referred to the *Meyer* case and to other cases in which the Court has used the due process clauses of the fifth and fourteenth amendments to protect fundamental personal liberties. This part of his opinion is basically a restatement of the classic fundamental rights theory. What is really novel, however, about Mr. Justice Goldberg's opinion is that he further supports the Court's role in protecting fundamental rights other than those stated in the Constitution by falling back on the ninth amendment.[51] For him the ninth amendment shows the intent of the Constitution's authors that fundamental personal rights should not be denied protection simply because they are not specifically listed in the first eight amendments.

Mr. Justice Goldberg went on to say that the right of privacy is a fundamental personal right emanating "from the totality of the constitutional scheme under which we live,"[52] and that the Connecticut statute dealt with a particularly important and sensitive area of privacy—that of the home and the marital relation. Connecticut had not shown that the law served any "subordinating interest which is compelling"[53] or that it was "necessary and not merely rationally related, to the accomplishment of a permissible state policy."[54] At most, the state argued that there was *some* rational relation between this statute and what was admittedly a legitimate subject of state concern—the discouragement of extramarital relations. While questioning the rationality of this justification, Mr. Justice Goldberg said that "in any event it [was] clear that the state

49. 291 U.S. 97 (1934).

50. 381 U.S. at 487 (quoting from Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). See also *id.* at 493, where in stating the fundamental rights theory he draws upon the language in Mr. Justice Douglas' dissenting opinion in the *Poe* case, quoted in text accompanying note 35 *supra*.

51. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

52. 381 U.S. at 494 (quoting from Poe v. Ullman, 367 U.S. 497, 521 (dissenting opinion of Douglas, J.)).

53. *Id.* at 497 (quoting from Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)).

54. *Ibid.* (quoting from McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

interest in safeguarding marital fidelity could be served by a more discriminately tailored statute, which [did] not . . . sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples."[55]

2. *Mr. Justice Harlan*

Mr. Justice Harlan's concurring opinion very clearly disassociated itself from the Douglas opinion, which Harlan reads as adopting the view that the fourteenth amendment protects only the rights guaranteed by the letter or the penumbra of the Bill of Rights. Just as Mr. Justice Harlan rejects the notion that the effect of the fourteenth amendment is to make the specifics of the Bill of Rights apply to the states, so he also rejects the idea that the fourteenth amendment cannot be used to protect rights that are not stated in the Bill of Rights. He rests his concurrence on the views he stated at length in his dissenting opinion in the *Poe* case, where he found the Connecticut statute invalid as an intrusion upon the intimacies of the marital relation that come within the protection accorded to the home.

3. *Mr. Justice White*

Mr. Justice White in his separate concurring opinion also clearly disassociated himself from the notion implicit in the majority opinion that only those rights embraced within the letter or the penumbra of the Bill of Rights are protected under the fourteenth amendment. He fell back upon the general theory that the fourteenth amendment protects against arbitrary or capricious denial of liberty and that the liberty thus protected includes the right "to marry, establish a home and bring up children"[56] and "the liberty . . . to direct the upbringing and education of children,"[57] and that these are among the "basic civil rights of man."[58] He also spoke of the right "to be free of regulation of the intimacies of the marriage relationship."[59] Thus, any statute forbidding the use of birth control devices by married persons, prohibiting doctors from giving advice to married persons on proper and effective methods of birth control, and having the clear effect of denying to disadvantaged citizens of the state access to medical assistance and up-to-date information with respect to methods of birth control, bears a substantial burden of justification when attacked under the fourteenth amendment. Con-

55. *Id.* at 497-98.
56. *Id.* at 502 (quoting from Meyer v. Nebraska, 262, 390, 399 (1923)).
57. *Ibid.* (quoting from Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).
58. *Ibid.* (quoting from Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
59. *Id.* at 503.

ceding that the state's policy against all forms of promiscuous or illicit sexual relationships is a permissible legislative goal, Mr. Justice White then proceeded to demonstrate that this particular restriction on the use of contraceptive devices by married couples could not be justified by reference to that legitimate public policy. The distinctive feature of Mr. Justice White's opinion, apart from the fact that it is a clear articulation of the substantive rights interpretation of due process, is the care with which he examines the Connecticut law in determining whether any rational consideration appropriate to matters of public concern justifies the restriction.

D. *Dissenting Opinions*

1. *Mr. Justice Black*

For those acquainted with Mr. Justice Black's dissenting opinion in the *Adamson* case, his dissent in *Griswold* comes as no surprise, since in his *Adamson* dissent he had already taken the position that the fourteenth amendment makes the Bill of Rights applicable to the states and that there is no basis for a judicial formulation of fundamental rights other than those embraced by the specifics of the first eight amendments. His dissent in large part reaffirms the basic idea set forth in his *Adamson* opinion—that it is the business of the Court to protect the specific rights guaranteed in the Constitution but not to pass judgment on the reasonableness of state legislative enactments alleged to impair other fundamental rights that have their source in a natural-law type of thinking. He therefore basically disagrees with the theory expressed by Justices Harlan and White in their concurring opinions. Likewise, he cannot accept the view stated by Mr. Justice Goldberg that the ninth amendment is a basis for judicial assertion of new fundamental rights, since, as he sees it, this is simply another way of stating the discredited natural rights philosophy. Moreover, he rejects the theory stated in Mr. Justice Douglas' opinion that the right of privacy involved in *Griswold* is embraced within the penumbra of rights specified in the Bill of Rights; he feels that it is much too broad a generalization to say that the specifics of the Bill of Rights create a general right of privacy of the kind relied upon by the Court.

2. *Mr. Justice Stewart*

Mr. Justice Stewart dissented on essentially the same grounds.[60] He agreed with Mr. Justice Black that the use of the ninth amend-

60. Mr. Justice Stewart's dissenting opinion in *Griswold* is the first clear-cut statement by him rejecting the formulation in the name of the due process clause of a

ment added nothing to the case so far as the Court's power to protect rights not specifically mentioned in the Bill of Rights is concerned, since the purpose of both the ninth and tenth amendments was to make clear that the federal government was to be a government of express, limited powers and that all rights and powers not delegated to it were retained by the people. Indeed, in his view, to say that the ninth amendment, intended as a restriction on the federal government, has anything to do with this case, involving the validity of a state statute, "is to turn somersaults with history."[61]

III. The Contribution of *Griswold* to General Constitutional Theory

In appraising the significance of *Griswold* we must distinguish between the immediate impact of the case and its larger significance in terms of general constitutional theory. *Griswold* holds no more than that a statute prohibiting the use of contraceptives by married couples is invalid as an invasion of a right of marital privacy protected against the states under the fourteenth amendment. The case does not mean that a state may not prohibit the manufacture and sale of contraceptives; still less does it suggest any questioning of the validity of laws dealing with illicit sexual relations. Two important types of right are stressed: the rights associated with marriage, family, and the home, and a right of privacy incident to constitutionally protected activities and relations. Family and marital rights have assumed a new constitutional significance, and fresh vitality has been given to the *Meyer* and *Pierce* decisions. Furthermore, recognition of the right of privacy may well be an opening wedge for extension of that right in new directions.

The larger significance of the case, however, is the contribution, if any, that it makes to general constitutional theory respecting fundamental rights, the relationship of these rights to the specifics of the Bill of Rights, and the standard to be employed by the Court in passing on the constitutionality of legislation allegedly impinging on fundamental rights.

A. *Application of the Bill of Rights Guarantees to the States*

Griswold does not bear directly on the question whether the effect of the fourteenth amendment is to make all the specifics of

theory of fundamental substantive rights not identifiable with the specifics of the first eight amendments. Compare his position, as expressed in his concurring opinion in Pointer v. Texas, 380 U.S. 400 (1965), that the due process clause assures a fundamental right to procedural fairness, and his reference in his opinion in *Griswold*, 381 U.S. at 528, to the use of the due process clause for that purpose.

61. 381 U.S. at 529.

the Bill of Rights apply to the states, but it seems clear that Justices Black and Douglas have gained no new converts to their position on this issue. Indeed, Mr. Justice Goldberg, in his concurring opinion joined by Mr. Chief Justice Warren and Mr. Justice Brennan, expressly said that he has not accepted that view, although he does agree that the fourteenth amendment does make applicable to the states the specifics which are fundamental. Mr. Justice Harlan has always made it abundantly clear that he totally rejects the incorporation theory in all of its aspects. Justices Clark, Stewart, and White have never identified themselves with the Black-Douglas thesis, and nothing in the separate opinions by Justices White and Stewart in *Griswold* would suggest an acceptance of that thesis. At most, then, it may be said that a majority of the Justices are ready to find that specifics of the Bill of Rights apply to the states only when those specifics are identified as fundamental rights. It is worth emphasizing that a majority could not have been mustered in *Griswold* to hold the statute invalid except for the concurrence of those Justices who found the statute invalid as an invasion of a right which they characterized as "fundamental."

B. *Fourteenth Amendment Protection of Rights Not Specified in the Bill of Rights*

The most immediate impact of the *Griswold* decision is on the concomitant question whether rights not specified in the Bill of Rights are protected under the due process clause of the fourteenth amendment. The decision is ambiguous in this respect. According to one view expressed in the case and supported by five of the Justices,[62] the right of privacy on which the case hangs is embraced within the penumbra or periphery of specifics guaranteed in the first eight amendments. On the other hand, it is also clear that the idea that the right of privacy is a fundamental right quite apart from the specifics of the Bill of Rights also receives the support of a majority of the Justices. Certainly Justices Harlan and White support this view, and I interpret Mr. Justice Goldberg's opinion to the same effect, although the fundamental rights thinking in his opinion is bolstered by an appeal to the ninth amendment. *Griswold* can thus be interpreted as a reaffirmation by a majority of the Court of the

62. This is the view expressed in the opinion of the Court written by Mr. Justice Douglas. Mr. Justice Clark concurred in this sub silentio, since he did not write a separate opinion. Mr. Justice Goldberg, joined by Justices Warren and Brennan, concurred in the Douglas opinion, although he also found an independent basis for the result in the fundamental rights theory.

fundamental rights theory—both in the sense that only fundamental rights derived from the Bill of Rights are incorporated into the fourteenth amendment and in the sense that the due process clause is a source of rights apart from the specifics of the Bill of Rights.

C. *The Standard To Be Employed in Evaluating State Legislation*

One of the more important aspects of the case is the strict standard employed by the Court in determining whether the Connecticut statute forbidding the use of contraceptives was constitutional as applied to married couples. It was not enough for the state to point to what it regarded as some rational considerations to support the restriction on married couples as a means of enforcing a general policy directed against promiscuous or extramarital sexual relations. The opinion by Mr. Justice Douglas applied the familiar idea of the overbroad statute: a legitimate governmental policy cannot be achieved by means which are so unnecessarily broad that they invade areas of protected freedom. Mr. Justice Goldberg's opinion stressed the idea that when a statute impairs fundamental personal liberties, the state must show that it is justified by a compelling public interest, and the law must be carefully tailored so as not to reach beyond the evil sought to be dealt with by intruding upon an important constitutional interest. In his dissent in *Poe*, Mr. Justice Harlan said that when a statute abridges fundamental liberties, a closer scrutiny is required than that indicated by the rationality test; he found nothing that even remotely justified the obnoxiously intrusive means employed by Connecticut to effectuate a policy expressing the state's concern for its citizens' moral welfare. He pointed to the "utter novelty" of the Connecticut statute's ban on the use of contraceptives by married couples.[63] Mr. Justice White, in his concurring opinion in *Griswold*, stressed the point that a state cannot enter the realm of family life "without substantial justification,"[64] and devoted a major part of his opinion to showing that no substantial justification was put forth to justify the sweeping scope of the statute and its telling effect on the freedom of married persons.

It is thus evident that the several members of the Court feel that an exacting judicial scrutiny, like that employed in cases involving first amendment freedoms, is required when legislation impinges upon the realm of the family life and marital relationship.

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63. Poe v. Ullman, 367 U.S. 497, 554 (1961).

64. 381 U.S. at 502.

IV. Some Comments and Observations

A. *No Major Change in Constitutional Theory*

Insofar as the result in *Griswold* rests on the fundamental rights interpretation of the due process clause of the fourteenth amendment, and as I interpret the opinions five Justices can be counted in support of this theory, the case states no new theory and is consistent with the main line of development under the substantive rights interpretation of the liberty protected by the due process clause. It also supports the statement made earlier that the Court has never repudiated the fundamental rights theory. Furthermore, the result is not at all inconsistent with the cases that have reduced economic liberty to a minimum of judicial protection, whether by denying that liberty of contract is a constitutionally protected right or by holding that it is subject to legislation that meets the test of rationality. The freedom of a legislature to determine economic policy in the public interest stands on a quite different level from its freedom to determine social policy by means that intrude upon personal liberty and essentially private conduct. It is fair to suppose that, notwithstanding statements to the contrary in some opinions, the Court will continue to recognize some basis for judicial protection of economic and proprietary liberties. The essential point is that restrictions on economic liberty are subject to a less exacting judicial scrutiny, with greater deference being shown to the legislative judgment. Here the simple rationality test applies,[65] but when legislation impinges upon fundamental non-economic liberties of an essentially personal character, as in *Griswold,* a more exacting judicial test is applied. There is nothing new about the idea that the Court sees a hierarchy of values protected under the Constitution and that the degree of judicial scrutiny and protection varies in direct proportion to the importance of the right. The frequently voiced notion that first amendment freedoms are "preferred" is an expression of this idea.[66] Similarly, in the interpretation of the equal protection clause the Court has made it clear that it is ready to depart from the rationality test in examining the constitutionality of legislative classification when the classification either rests on a factor that the Court regards as impermissible in view of our whole constitutional tradition or serves the purpose of impairing important personal interests.[67]

65. See Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (concurring opinion of White, J.); Poe v. Ullman, 367 U.S. 497, 518 (1961) (dissenting opinion of Douglas, J.).

66. See McKay, *The Preference for Freedom,* 34 N.Y.U.L. Rev. 1182 (1959).

67. See McLaughlin v. Florida, 379 U.S. 184 (1965) (White, J.), rejecting the rationality test when legislation is based on a racial classification; Skinner v. Oklahoma, 316

B. *Criticism of Mr. Justice Douglas' Opinion*

The opinion by Mr. Justice Douglas appears to me to be a labored attempt to identify the right of marital privacy with the specifics of the Bill of Rights. It says, when we penetrate the special vocabulary (peripheral rights, penumbras formed by emanations from specific rights, zones of privacy), that the right of marital privacy is implied from an aggregate of specifics. I have no difficulty with such a theory of implied rights. For example, the right to associate for the purpose of expressing views on political, economic, and social matters seems fairly to be implied from the first amendment. It is another thing, however, to suggest that because marriage is a form of association it comes within the protection afforded freedom of association. The Bill of Rights does in various specifics recognize zones of privacy in protecting persons, their homes, and even their political views from intrusion by government. Again, however, it is quite another thing to say that a general right of marital privacy can be distilled from these specifics.[68] It is not stretching things to say that the sanctity of the home protected against unreasonable searches and seizures implies a privacy of family life, as Mr. Justice Harlan pointed out in his illuminating dissent in *Poe*. But it protects this privacy against unreasonable intrusions by public officers; it is another thing to hold unconstitutional a law which has the effect of intruding into this privacy by subjecting marital intimacies to criminal sanctions and which could therefore be authority for a search and seizure to determine whether the statute is being violated. Insofar as the Court assumes to invalidate legislation by converting a freedom from unreasonable police searches into a fundamental substantive right restricting legislative action in formulating social policy, it is engaging in that expansive use of the judicial power to formulate conceptions of fundamental rights as a limitation on legislative invasion which has characterized the judicial role under the due process clause.

The point of the foregoing discussion is that a theory of rights implied from the specifics of the Bill of Rights can be pushed to the point where the distinction between such "implied" rights and the formulation of "fundamental" rights in the interpretation of the due process clause is wholly verbal and without substance. The question that may be raised about all this is whether the Court,

U.S. 535 (1942), holding invalid a classification used in a statute requiring the sterilization of habitual criminals; Reynolds v. Sims, 377 U.S. 533 (1964), holding invalid a state legislative apportionment system because of its discriminatory impact on the right to vote.

68. 381 U.S. 479, 508-09 (dissenting opinion of Black, J.).

through the peripheral-emanations-penumbra process of interpretation, is really finding a more objective and more secure basis for the new right it has recognized than is found in the fundamental rights interpretation of the due process clause. Indeed, in order to command the support of a majority of the Court, it is still essential to find that the right embraced within penumbras of the specifics of the Bill of Rights is a fundamental right; judicial subjectivity thus still plays a crucial part in the final decision.

The accordion-like qualities of the emanations-and-penumbra theory, and the ease with which it can be used in the same broad way in which the fundamental rights theory has been used, become evident when one considers its application to areas where the Court in recent years has limited the sphere of constitutional protection. The point is made that since liberty of contract is not mentioned in the Constitution, it should not be a constitutionally protected right. Yet, since the body of the Constitution protects against the impairment of the obligations of contracts, it does not require a far-fetched application of the emanations-and-penumbra theory to suggest that implicit in the contracts clause (or at least radiating from it) is a constitutional right to enter into contracts. Likewise, it may be suggested that since the fifth amendment protects property against expropriation without compensation, there is surely a penumbra of rights emanating from this which would include the right to acquire and enjoy the use of property without arbitrary interference by the government. I am not suggesting that the Court will arrive at these results through the application of the peripheral-emanations-penumbra idea. The only point I wish to make is that in extending the specifics to the periphery, and in finding rights derived from the total scheme of the Bill of Rights, the Court is applying essentially the same process as that used in the fundamental rights approach, but dignifying it with a different name and thereby creating the illusion of greater objectivity.

As was made clear in the concurring opinions, the past decisions of the Court, notably the *Meyer* and *Pierce* cases, offered an immediate opening for finding that marital privacy, as a facet of the freedom of family life, was a fundamental right. Yet Mr. Justice Douglas, steadfastly adhering to the objective of finding the protected right embraced within the specifics of the first eight amendments, rejected this opening. While declaring that the Court reaffirmed the principles of these two cases, he interpreted them as showing that the first and fourteenth amendments forbid a state to contract the spectrum of learning—an interpretation that would have been astonishing to Mr. Justice McReynolds, who wrote the opinion in these cases,

which rested squarely on the fundamental rights interpretation of the due process clause.

It appears also that Mr. Justice Douglas, in his *Griswold* opinion, retreated from his dissenting opinion in *Poe*, where he indicated that the Court should invalidate, in the name of the due process clause, legislation that impinged on an interest "implicit in a free society." His reason for abandoning this idea in *Griswold* is perhaps to be found in the responsibility he faced for writing an opinion for the Court that would avoid the inevitable division flowing from a straightforward substantive rights interpretation of the due process clause. But his effort, if it can be explained on this basis, was not a richly rewarding one in view of the divisions within the Court and the separate concurring opinions.

C. *The Ninth Amendment*

Mr. Justice Goldberg's use of the ninth amendment is an interesting tour de force, but I fail to see how it adds in any substantial way to the argument respecting the fundamental rights theory. For years the Court followed the theory without finding it necessary to fall back on the ninth amendment, which was certainly designed as a limitation on the federal government. Perhaps the ninth amendment argument gives some satisfaction to Justices who have a sense of uneasiness about going outside the Constitution in protecting certain kinds of rights and helps to support further the illusion of objectivity. Even if one were to concede that the use of the ninth amendment negated the Black-Stewart hypothesis, however, it is apparent that the basic problems in the use of the fundamental rights theory still remain: what rights are fundamental and to what limitations are they subject? One may conclude that the ninth amendment adds a nice ornament to the argument, but that is about all. On the other hand, the rejections by Justices Black and Stewart of the ninth amendment argument are not very persuasive either. Their point of emphasis is that the ninth and tenth amendments were intended to make it clear that the federal government is one of restricted powers. This may be conceded, yet the ninth amendment would still support the position taken by Mr. Justice Goldberg that the first eight amendments were not deemed exhaustive of the rights enjoyed by the people. The weakest part, however, of the Black-Stewart argument based on the ninth amendment is that the whole history of the interpretation of the fourteenth amendment has been a story of the forging of new limitations on the states. Particularly at the hands of Mr. Justice Black, it has been a process of making

applicable to the states the specifics of the first eight amendments. By equal force of reasoning, the ninth amendment should be incorporated into the fourteenth. If it is a "somersault of history" to use the ninth amendment as a weapon of interpretation in order to restrict a state's legislative power, it is certainly no greater somersault of history than that involved in finding that the states are subject to the establishment-of-religion clause of the first amendment, when it is clear that historically the principal purpose of that clause was to prohibit Congress from interfering with state establishments.[69]

D. *Mr. Justice Black's Thesis*

In his dissenting opinion Mr. Justice Black reaffirmed and enlarged upon the basic view expressed in his dissent in *Adamson* that the Court has no business invalidating state legislation that does not violate the specifics of the Bill of Rights or other specifics found in the Constitution. The whole fundamental rights theory is anathema to him as an expression of judicial subjectivity and of natural rights philosophy. Yet his proposed application to the states of all the specifics of the Bill of Rights is in itself an extraordinary assertion of judicial power, unsupported by the text or history of the fourteenth amendment.[70] Moreover, Black's thesis runs into difficulties when account is taken both of the ninth amendment, which according to his logic should also be made applicable to the states, and of the due process clause of the fifth amendment, both of which furnish means for invalidating governmental action on grounds other than those stated in the specifics of the Bill of Rights. An even more basic consideration, however, is that some of the so-called specifics of the Bill of Rights are not so very specific; they admit of a very large element of judicial subjectivity and discretion in their application, as evidenced by Mr. Justice Douglas' use of peripheries, emanations, and penumbras in his *Griswold* opinion. It happens that Mr. Justice Black cannot subscribe to an expansive use of the specifics in this particular case. Yet it will be recalled that it was Mr. Justice Black who wrote the opinion of the Court in *Brotherhood of Railway Trainmen v. Virginia ex rel. Virginia State Bar*,[71] in which the Court protected, as an associational right under the first amendment, the right of a railway union to assist the prosecution of claims by injured railroad workers through the giving of advice on their rights

69. See School Dist. v. Schempp, 374 U.S. 203, 309 (1963) (dissenting opinion of Stewart, J.).

70. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

71. 377 U.S. 1 (1964).

and the channeling of legal employment to particular lawyers. This is certainly a more extensive and more distinctively marginal use of the first amendment than the use of the specifics to protect the right of privacy in the *Griswold* case.[72] To exclude the privacy of marital association from protection under the Bill of Rights, while using the first amendment as an umbrella for the kind of associational right protected in the *Brotherhood* case, appears to be a case of straining at gnats while swallowing a camel. Moreover, as was suggested by Mr. Justice Harlan in his concurring opinion in *Griswold,* the breadth of the interpretation of the equal protection clause in *Reynolds v. Sims*[73] and of Article I in *Wesberry v. Sanders,*[74] whereby the Court used those provisions as vehicles for invalidating legislative apportionment systems, is a much more audacious and far-reaching judicial interference with the state legislative process, sanctioned neither by history nor by the specifics of the Constitution, than the comparatively innocuous use of judicial power in *Griswold* to invalidate a law which was found on the statute books of a single state and which in most respects was not being enforced. Compared with the use of judicial power in the apportionment cases, *Griswold* is but a tempest in a teapot in its use of judicial power to invalidate a statute impinging on the right of privacy. The equal protection clause is as much an invitation to judicial formulation of policy as the due process clause. In his dissent in *Griswold,* Mr. Justice Black protested against the idea that it is the Court's duty to keep the Constitution in tune with the times and quoted with approval the late Judge Learned Hand's statement that he would find it most irksome "to be ruled by a bevy of Platonic Guardians."[75] Mr. Justice Harlan applauded these sentiments and suggested that the Court would have been well advised to heed this advice when dealing with the apportionment issue.

72. See also Robinson v. California, 370 U.S. 660 (1962), where the Court made a curious use of the "cruel and unusual punishment" limitation in invalidating a state statute which, as construed, made it a crime to be a drug addict. This is another instance where the Court, as an alternative to a straightforward application of the familiar idea that the due process clause states an independent substantive limitation on the arbitrary exercise of governmental power, achieved the same result by resorting to a strained interpretation of a Bill of Rights specific in giving content to the due process limitation. See the concurring opinion by Mr. Justice Harlan, and the following language from Mr. Justice White's dissenting opinion: "Finally, I deem this application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress." 370 U.S. at 689.

73. 377 U.S. 533 (1964).

74. 376 U.S. 1 (1964).

75. 381 U.S. at 526 (quoting from HAND, THE BILL OF RIGHTS 73 (1958)).

Justices Black and Stewart interpret the Court's recent decisions as a repudiation of fundamental rights thinking. Thus Mr. Justice Black referred to *Griswold* as a retreat from *Ferguson v. Skrupa*,[76] in which he had said that the Court had long since discarded the idea that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely. They view recent cases finding legislation invalid under the due process clause as meaning only that the Court uses this clause to enforce procedural fairness, to condemn vague criminal legislation, and to invalidate legislation that abridges the specifics of the Bill of Rights.[77] But surely a case like *Aptheker v. Secretary of State*,[78] holding the denial of passports to Communists invalid under the due process clause as an over-broad restriction on the right to travel protected under the due process clause, is an affirmation of the fundamental rights interpretation of due process. Mr. Justice Black asserted in *Griswold* that if *Aptheker* "was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it."[79] But one may ask in turn whether all of the Justices who concurred in the *Skrupa* opinion understood that they were overruling sub silentio earlier cases like *Meyer* and *Pierce*. As *Griswold* has made clear, the notion of substantive due process shows a remarkable vitality despite Mr. Justice Black's several efforts to lay it to rest and to pronounce a fitting requiem.

As Justices Black and Stewart so well pointed out, there is always the danger that the Court, in employing the fundamental rights theory, will substitute its judgment for that of the legislature in determining what is wise economic or social policy. This risk, however, is inherent in the system of judicial review and occurs whenever the Court invalidates a legislative act, whether in the name of due process or equal protection, in the name of the broad specifics of the Bill of Rights, or in the name of the peripheral rights embraced in the penumbra of the specifics, and regardless of whether the Court employs a technique of balancing interests or uses a standard of reasonableness, or employs a more exacting judicial scrutiny as in the instant case. The basic problem is not whether a court in exercising the power of judicial review may pass judgment on legislative

76. 372 U.S. 726 (1963).

77. See Griswold v. Connecticut, 381 U.S. at 517 n.10 (dissenting opinion of Black, J.); *id.* at 528, 530 n.7 (dissenting opinion of Stewart, J.). One very interesting aspect of *Griswold* is the wide differences among the Justices in interpreting prior cases.

78. 378 U.S. 500 (1964).

79. 381 U.S. at 517 n.10.

acts, but rather how wisely it exercises this power in identifying, appraising, and weighing the competing interests. The Court is always faced with the task of defining the right and determining the standard to be employed in passing on the constitutionality of legislation impinging on the right. These are two distinctive aspects of the judicial function in these cases. To refuse to recognize a right claimed to be basic to our constitutional order for fear that the Court, in exercising its power to protect that right, will employ a standard whereby it usurps the legislative function in determining basic social policy, obscures analysis of the Court's role and denies the Court's resourcefulness in employing standards appropriate to the particular case. It is worth emphasizing here that the members of the Court who found the Connecticut statute invalid as applied to invade the realm of marital rights did not purport to pass judgment on the wisdom or reasonableness of the general moral policy expressed in the legislation.

E. *Conclusion*

Griswold v. Connecticut is a reaffirmation of a power long exercised by the Court in protecting fundamental rights. It required no judicial roving at large to reach the conclusion that the freedom of the marital relationship is a part of the bundle of rights associated with home, family, and marriage—rights supported by precedent, history, and common understanding. For a court to find that these rights are fundamental, whether because they are deeply written in the tradition and conscience of our people, are part of the concept of ordered liberty, are implicit in the notion of a free society, or emanate from the totality of the constitutional order, involves no immodest or startling exercise of judicial power. The decision operates within a narrow sphere. In exercising its power in *Griswold* to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road to judicial supremacy, was treading a worn and familiar path.